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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-478

PAUL A. MAPES AND JANE A. BRYSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, Paul A. Mapes and Jane A. Bryson, pray for a writ of certiorari to review the judgment and opinion of the United States Court of Claims entered in this proceeding on May 17, 1978.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 1a-16a) is reported at 576 F.2d 896.

JURISDICTION

The judgment of the Court of Claims was entered on May 17, 1978. A petition for reconsideration, timely filed, was denied on June 23, 1978 (App. A, *infra*, p. 17a). The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTION PRESENTED

Whether the provisions of sections 1 and 42 of the Internal Revenue Code (26 U.S.C. §§1,42) are unconstitutional insofar as they required the petitioners to pay $1220 more in Federal income taxes for calendar year 1976 than they would have paid if unmarried.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves sections 1 and 42 of the Internal Revenue Code (26 U.S.C. §§1, 42) and the Fifth Amendment to the Constitution. These provisions are reprinted in pertinent part in Appendix B, *infra*, pp. 18a-23a.

STATEMENT OF THE CASE

This is an action by petitioners, married wage earners, for a refund of that part of their 1976 Federal income taxes ($1220.10) which exceeds the amount of taxes which would have been due had each petitioner been unmarried on December 31, 1976. The action was brought in the United States Court of Claims pursuant to 28 U.S.C. §1491. The facts are not disputed.

The husband and wife plaintiffs in this action were married in Virginia on April 17, 1976. Prior to their marriage the plaintiffs orally agreed, in recognition of Ms.

Bryson's desire to maintain her financial autonomy, that each spouse would maintain separate ownership and possession of his or her respective income, from whatever sources derived. This agreement is entirely consistent with the law of Virginia, which provides that all married women have the unrestricted right to acquire, hold, use, control and dispose of property as if unmarried. Va. Code §§ 55-35–37. Since their marriage, the plaintiffs have conducted their financial affairs in full compliance with the terms of their antenuptial agreement.

If the plaintiffs had remained unmarried throughout all of 1976 plaintiff Mapes would have incurred a total 1976 Federal income tax liability of $3,701 on his taxable income of $16,763.20 and plaintiff Bryson would have had a tax liability of $3,611 on her taxable income of $15,890.17. Instead, solely because of their marital status the plaintiffs were required to pay Federal income taxes totalling $8,532.10–$1220.10 more than their combined tax liability as single persons.

The so-called "marriage penalty" is primarily the result of the statutory changes enacted by the Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487. Prior to the enactment of that legislation there existed, with certain exceptions[1], a single tax rate schedule under which taxpayers were taxed individually without regard to their marital status.[2] However, married taxpayers also had the option of filing a joint return on their aggregated income and paying an amount equal to twice the tax on one-half of their combined income.[3] Because the tax rates are progressive, this option, which is commonly known as

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[1] *See, e.g.*, Internal Revenue Code of 1954, c. 736, §1(b), 68A Stat. 5 (heads of households) (prior to 1969 amendments).

[2] *Id.*, §1(a).

[3] *Id.*, §2(a), 6A Stat. 8.

income-splitting, in effect permitted a husband and wife to average their separate incomes and thereby reduce their combined tax liability below what it would have been if the spouses had been taxed individually.[4] Not all married couples, however, benefitted equally from income-splitting. The tax savings varied in direct proportion to the disparity of incomes between spouses. Thus, where only one spouse had income, the tax savings was substantial, but when both spouses had incomes which were equal or nearly equal, there was no tax savings and the husband and wife each bore the same tax burden a single person would have.

Since single persons are not able to file joint returns, prior to 1969 it was felt by many that single persons bore a disproportionate share of the Federal tax burden. To remedy this perceived inequity, Congress, in enacting the Tax Reform Act of 1969, lowered the tax rates applicable to single persons.[5] At the same time Congress precluded married individuals from being taxed as single persons and provided instead that married taxpayers could elect between filing 1) joint returns applicable to the combined incomes of both spouses[6] or 2) separate returns upon which the income of each spouse would be taxed individually.[7] However, in giving married persons

[4]This system was adopted as part of the Revenue Act of 1948 for the purpose of taxing married couples in common law states at the same rates applicable to married couples residing in community property states. Married taxpayers in community property states had previously been permitted to split their incomes for tax purposes as a result of this Court's decision in *Poe v. Seaborn*, 282 U.S. 101 (1930).

[5]P.L. 91-172, §803, 83 Stat. 487 (codified at 26 U.S.C. §1(c)).

[6]*Id.* (codified at 26 U.S.C. §1(a)).

[7]*Id.* (codified at 26 U.S.C. §1(d)).

these options, Congress structured the rate schedules so that in virtually no event could married taxpayers reduce their taxes by filing separately. As a consequence, all married couples are now in effect compelled to be taxed jointly on the basis of the combined incomes of the individual spouses. This means that even those couples who do not benefit appreciably from income-splitting (i.e., two-income couples) are precluded from being taxed as single persons. Such couples are thus denied participation in the tax reduction which Congress felt was justified to offset the tax savings which are achieved by those couples which benefit most from income-splitting (i.e., single-income couples). It is primarily for this reason that two-income married couples are now required to bear a greater tax burden than they would if unmarried.

The increased tax burden on two-income married couples is compounded by the provisions of Section 42 of the Internal Revenue Code (26 U.S.C. §42). Under this section individual taxpayers are permitted to take an annual credit against their personal income taxes in an amount equal to the greater of two percent of the taxpayer's taxable income up to $9,000 or $35 multiplied by each exemption to which the taxpayer is entitled. However, according to the Internal Revenue Service interpretation of this section, married taxpayers who elect to take a credit equal to two percent of their taxable incomes are limited to a single combined credit of $180. In other words, two individual taxpayers each having taxable incomes in excess of $9,000 are each entitled to a $180 credit, unless they are married, in which case they must share a single $180 credit.

Of the $1220 increase in the petitioners' tax burden, $1040 is due to the legislative changes adopted by the Tax Reform Act of 1969 and $180 is due to the provisions of 26 U.S.C. §42.

REASONS FOR GRANTING THE WRIT

A.

THIS CASE INVOLVES A NOVEL ISSUE OF GREAT SOCIAL AND CONSTITUTIONAL IMPORTANCE

Approximately 13 million married couples bear an additional Federal income tax burden as a result of their marital status.[8] For many the additional burden is annually in excess of $1,000 and for some the cost is as much as $4,000 a year.[9] As a result some couples have divorced and others have been deterred from marrying altogether.[10] This is a phenomenon which was also ob-

[8] *See* Sailer, *Using Tax Returns to Study Wage and Taxpaying Patterns by Sex, 1969 and 1974,* in *1976 American Statistical Ass'n Proceedings, Social Statistical Section* 734 at 738 (1976). All totalled, these couples paid approximately $1.9 billion more in Federal income taxes in 1974 than they would have paid if taxed as individuals. *Id.* at 739.

[9] According to the Sailer study in 1974 there were approximately 19,600 couples in which both the husband and wife had earned income of $20,000 or more. *Id.* at 736. Under the Federal income tax rate schedules for 1976 each of these couples would have incurred, solely as a result of their marital status, an additional tax burden of $1992 or more. As well, it is estimated that in 1974 there were another 101,900 couples in which both spouses had earnings of $15,000 or more. *Id.* For calendar year 1976 each of these couples would have incurred an increased tax burden of $1080 or more. Under the 1976 rate schedules, when both spouses have separate incomes of $30,000 their combined tax liability is $4,077 more than it would be if the taxpayers were unmarried. (*See* tax tables at 26 U.S.C. §1(a) and (c). *See also* Charts I and II, App. at 16a. All calculations assume the standard deduction and do not reflect the 1976 General Tax Credit.)

[10] Representative Martha Griffiths has disclosed that she has: "constituents who sought a divorce because of the marriage penalty. And the court refused to give it to them on that ground. And then no-fault came in in Michigan and they got a divorce right then, and went right on living together." *Hearings on the Economic Problems of Women,* Joint Economic Comm., 93rd Cong., 1st Sess. 271 (1973). Similarly, Representative Millicent Fenwick has reported that two of her constituents have decided not to marry in order to avoid a $600 a year increase in their tax burden. Press release from the Office of Representative Millicent Fenwick, March 3, 1978. Also, the IRS has found it necessary to issue a revenue ruling stating that couples cannot avoid the marriage penalty simply by divorcing in December and re-marrying in January. Rev. Rul. 76-255, 1976-2 C.B. 40.

[footnote continued]

served in Sweden under a similar tax system.[11] Additionally, economists have concluded that the present system of taxing married couples has also deterred some married women from seeking employment outside of the home.[12] It is for this reason that a number of European countries have recently revised their income tax systems to permit married women to be taxed without regard to their husbands' separate earnings.[13]

In addition, it has been said that the very existence of the marriage penalty tends to generate a loss of public confidence in the legitimacy of the entire Federal tax system. As the Chicago Tribune observed in an editorial concerning this Court's denial of certiorari in a previous case challenging the constitutionality of the marriage penalty:

[11] *See,* Sundberg, *Marriage or No Marriage: The Directives for the Revision of Swedish Family Law,* 20 Int'l and Comp. L. Q. 223, 230-31 (1971).

[12] *See, e.g.,* Rosen, *Applications of Optimal Tax Theory to Problems in Taxing Families and Individuals,* at 10-11 (Dept. of the Treasury, Office of Tax Analysis Paper No. 21, 1976). *See also* Boskin, *The Effects of Government Expenditures and Taxes on Female Labor,* 64 Amer. Econ. R. 251 (1974). ("The net effect of the tax system is clearly to drive female labor out of the [job] market into the home. . . ." *Id.* at 256.)

[13] Sweden (1971), The Netherlands (1973), United Kingdom (1972) and Finland (1975). *See* Organisation for Economic Cooperation and Development Committee on Fiscal Affairs, *The Treatment of Family Units in OECD Member Countries Under Tax and Transfer Systems,* 18-19 (1977). Other countries which have recently decided to tax married persons on the basis of their individual incomes include Denmark (1970), Austria (1973) and Belgium (1976). *Id.* at 15-17.

> Income taxes take an enormous chunk of the earnings of most working Americans, and tax collection depends in large part on the honesty and good will of the taxpayers. For the system to work, it must be fair, and must be perceived to be fair by those who support it. For the Justice Department to argue that fairness is impossible . . . is intolerable.[14]

In short, this case concerns a matter of substantial and multifaceted social consequence.

Moreover, this case involves constitutional issues which are of fundamental importance. As this Court has repeatedly recognized, the right to marry is one of the most important of all civil liberties and one entitled to the highest degree of judicial attention and protection. *Maynard v. Hill,* 125 U.S. 190 (1888); *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Loving v. Virginia,* 388 U.S. 1 (1967); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977); *Zablocki v. Redhail,* 434 U.S. 374 (1978). Similarly, this Court has shown particular vigilance in reviewing legislative schemes which have a discriminatory impact on women, especially where, as the petitioners contend in this case, the legislation is based upon stereotyped generalizations about the social and economic role of married women. See, e.g., *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973), and *Califano v. Goldfarb,* 430 U.S. 199 (1977).

Although the tax penalty on marriage has been widely ridiculed,[15] and Congress has twice held hearings on this

[14] *The "Marriage Tax" Is Upheld,* Chicago Tribune, Jan. 11, 1978, at 10, col. 1.

[15] *See, e.g., The "Marriage Tax" Is Upheld,* Chicago Tribune, Jan. 11, 1978, at 10, col. 1 ("a blatant . . . injustice"); *Separate (Tax) Tables: Your Getting Married May Make Jimmy Carter Grin—The*

[footnote continued]

problem,[16] virtually nothing has been done to revise the tax system. Indeed, as recently as 1975 Congress enacted tax legislation which increased the relative tax burden on many married couples by as much as an additional $180 a year.[17] Moreover, the present Administration has even withdrawn a legislative proposal which would have offered only limited relief from the effects of the marriage penalty.[18] Thus, given this political insensitivity to such a socially and constitutionally important issue, it is especially fitting that this Court hear the petitioners' case.

As noted above, this Court has already once denied certiorari in a similar case. *Johnson v. United States,* 422 F. Supp. 958 (N.D. Ind. 1976), aff'd *sub nom. Barter v. United States,* 550 F.2d 1239 (7th Cir. 1977), cert. den. 434 U.S. 1012 (1978). Petitioners submit, however, that it is now appropriate to review this issue. Since the *Barter* petition was denied this Court has held that legislation which "significantly interferes" with the right to marry must be given strict equal protection scrutiny. *Zablocki v. Redhail, supra* at 383. This holding is of particular importance since the burden on the petitioners' marriage ($1220 in 1976) is substantially greater than the burden on the plaintiffs in the *Barter* case ($160 and $479). This petition thus involves both a new standard of review and, on the basis of that standard, a stronger case for a finding of unconstitutionality. As well, review of this case would

IRS, Too, Wall Street J., April 18, 1977, at 36, col. 1 ("Doubtless due to an oversight in last year's tax reform, the government still permits people to marry when they wish."); *"Marriage Tax" Has Couples in a Rage—and Even Divorcing,* N.Y. Times, March 27, 1975, at 26, col. 1 ("This strange inequity. . . .").

[16] *See* note 10, *supra,* and note 21, *infra.*

[17] *See* P.L. 94-164, 89 Stat. 972 (amending 26 U.S.C. §42).

[18] *See Carter Sends $24.5 Billion Net Tax Cut to Hill,* Washington Post, Jan. 22, 1978, at A-4, col. 2.

also be appropriate for the purpose of further articulating the distinctions between this Court's holding in *Zablocki* and its holding in *Califano v. Jobst,* 434 U.S. 47 (1977). As explained *infra* at 11, the Court of Claims has concluded on the basis of *Jobst* that strict scrutiny review is not required unless a legislative scheme "operates to preclude marriage entirely for a certain class of people." This is a standard which is apparently in conflict with the holding in *Zablocki* that strict scrutiny is required whenever legislation "significantly interferes" with the right to marry.

Finally, it is also important to note two additional factual distinctions between the *Barter* case and the petitioners' case. First, by virtue of their antenuptial agreement, the petitioners in this action have in fact maintained financial autonomy from one another. Thus, in this case, there is, unlike in *Barter,* a factual situation which is inconsistent with the apparent legislative premise that all husbands and wives pool their separate incomes. Accordingly it may be possible for this Court to find that the Tax Code is unconstitutional as applied to the petitioners but not necessarily invalid as applied to other married couples. Secondly, in this proceeding there can be no claim, as there was in *Barter,* that the petitioners are time-barred under the terms of 26 C.F.R. §1.6013-1 (1976).[19]

[19] In *Barter* it was argued by the government that the plaintiffs in that action were barred from seeking a refund because they failed to file separate returns on or before the last date on which a joint return could be filed (April 15, 1972). 422 F. Supp. 958 at 963. In contrast, the petitioners now before the Court did in fact file separate returns prior to the last date on which they could have filed a joint return (April 15, 1977). Although the District Court in *Barter* rejected the Government's arguments on this point, the court's reasoning was in error. This is so because the court mistakenly concluded that, "if the Government's argument were

[footnote continued]

B.

THE COURT OF CLAIMS HAS DECIDED THIS CASE IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

1. In its opinion the Court of Claims stated:

> We read the *Jobst* and *Zablocki* cases together to imply that the application of strict scrutiny is appropriate only where the obstacle to marriage is a direct one, i.e., one that operates *to preclude marriage entirely* for a certain class of people . . . [emphasis added]. (App. at 8a).

The court thus declined to apply a strict scrutiny standard to the facts of this case. The court's conclusion, however, is inconsistent with the express language of this Court's holding in *Zablocki.* There the Court repeatedly stated that it would engage in strict scrutiny review whenever legislation "significantly interferes" with the right to marry. 434 U.S. 383-87. This test is considerably broader in its scope than that applied by the Court of Claims: whether or not the legislative scheme "operates to preclude marriage entirely." This Court's recognition of this distinction is affirmed by its description of the legislation invalidated in *Zablocki:*

> Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to [meet their child support obligations and obtain a court order permitting marriage] that they

accepted, the practical effect would be to insulate from [constitutional] attack the rate schedule." 422 F. Supp. at 964. This statement is incorrect because even under the terms of 26 C.F.R. § 1.6013-1 married couples do have the option of filing, as the petitioners did, both a joint return and separate returns prior to the deadline for filing a joint return. This point is of special significance because it suggests that this Court could invalidate the marriage penalty in this case without at the same time necessarily obligating the Government to refund overpayments received in the past from other married couples which failed to file separately before the deadline set forth at 26 C.F.R. § 1.6013-1.

> will in effect be coerced into foregoing their right to marry. *And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice* in an area in which we have held such freedom to be fundamental [emphasis added]. *Id.* at 387.

In this proceeding the plaintiffs' right to marry has not been entirely precluded, but it has been the object of "significant interference." The *Jobst* decision is distinguishable because there the financial loss sustained by the plaintiff was neither substantial nor one in which he had a constitutionally recognized property interest. *See Zablocki, supra,* at 387 n.12, and *Weinberger v. Salfi,* 422 U.S. 749 (1975).

2. In their briefs before the Court of Claims the petitioners argued that the tax penalty on marriage has a discriminatory impact on women and is based on stereotyped generalizations about the social and economic role of married women. Although these contentions were supported by ample citation to appropriate authorities, the Court of Claims failed to directly address these arguments and simply concluded that because the Internal Revenue Code does not on its face discriminate on the basis of sex there could be no constitutional infirmity (App. at 9a). In this respect the court clearly failed to address this Court's reasoning in *Califano v. Jobst,* 437 U.S. 47 (1977), and *Califano v. Goldfarb,* 430 U.S. 199 (1977). In *Jobst* this Court specifically suggested that it might have reached a different result in that case if the legislative burden on the Jobsts' marriage had been the result of stereotyped thinking about a traditionally disadvantaged group such as married women. In explaining its holding this Court said:

> For the marriage rule cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group . . . [citing *inter alia Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975)]. 434 U.S. 47, 54.

As well, in its plurality opinion in *Goldfarb* this Court noted that although on its face the statute there in issue discriminated against men alone, in practice it "discriminates against one particular category of family—that in which the female spouse is a wage earner." 430 U.S. 199, 209.

The evidence of the marriage penalty's discriminatory impact on married women, and on families in which the female spouse is a wage earner, is substantial. This discriminatory impact is a result of the fact that in almost all families the wife is the secondary wage earner, i.e., the one with the smaller income. Consequently, because under the Internal Revenue Code the secondary wage earner's first dollar of income is in effect taxed at the primary wage earner's (husband's) marginal (highest) tax rate, working wives bear a higher tax burden than they would if taxed solely on the basis of their own incomes. The tax system thus creates an artificial burden on those married women who seek to enter the job market. Accordingly, as pointed out by Professor Boris Bittker, "In a society that takes the husband's job for granted and views the wife as a secondary wage earner . . . it is reasonable to describe the existing state of affairs as biased against women."[20]

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[20] Bittker, *Federal Income Taxation and the Family,* 27 Stan. L.R. 1389, 1433 (1975). See also, Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers,* 21 Buff. L.R. 49 (1972), and Nussbaum, *The Tax Structure and Discrimination Against Working Wives,* 25 Nat'l Tax J. 183 (1972). Economists have also perceived the discriminatory impact of the existing system of taxing married couples. *See* note 12, *supra.*

Moreover, there is good reason to believe that the tax penalty on marriage found its way into the Internal Revenue Code as a result of stereotyped assumptions about the social and economic role of married women. Ironically, the relationship between the type of tax scheme now before the Court and stereotyped thinking about married women was first identified and cogently explained by Justice Holmes in his dissenting opinion in *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931). Although in that case this Court found unconstitutional a tax scheme essentially identical to the existing Federal system of taxing married couples, Justice Holmes felt the law should be upheld as merely representing a natural legislative reaction to the traditional and subordinate status of married women:

> The [Wisconsin tax] statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that one the husband; and that as the husband took the wife's chattels he was liable for her debts. They form a system with echoes of different moments, none of which is entitled to prevail over the other. 284 U.S. 206, 219.

The architects of the existing Federal tax system apparently relied on the same presumptions about married women that Justice Holmes saw at the root of the invalidated Wisconsin law. For instance, in 1972 an Assistant Secretary of the Treasury for Tax Policy who was actively involved in the formulation of the 1969 Tax Reform Act gave the following justification for taxing husbands and wives as a single entity:

> Beyond that I happen to feel, Mr. Chairman, that the husband and wife represent a partnership, and that they have common interests, and *the wife is I think in our basic American tradition devoted to her husband's success and efforts and that we really ought not try to distinguish between the income of one and the income of the other,* but treat them as a marital unit, each trying to achieve the same goals [emphasis added].[21]

In addition, since the architects of the 1969 Tax Reform Act apparently assumed that married women are generally not employed outside of the home, the legislators failed even to recognize that under the Act some married persons would bear a greater tax burden than single taxpayers. The relationship between this stereotyped assumption about married women and the challenged provisions of the Internal Revenue Code has, in fact, been confirmed by a participant in the legislative process. According to Representative Martha W. Griffiths:

> . . . the marriage penalty wasn't even noticed when it went into effect. The effort of the committee was to help out single people. I had gone home, and there was nobody on the conference committee that had a working wife. They didn't even look to see what it did. When I came back and found out what it did, I might say that I was very annoyed.[22]

This legislative failure to recognize the emergence of the marriage penalty is manifested in the tax withholding tables prescribed in the 1969 legislation. Since these tables require employers to withhold *more* from single taxpayers than from married taxpayers, couples affected

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[21] Statement of Edwin S. Cohen, Assistant Secretary for Tax Policy, Dep't of the Treasury, *Hearings on Tax Treatment of Single Persons and Married Persons When Both Spouses Are Working*, Comm. on Ways and Means, House of Rep., 92nd Cong., 2nd Sess. 85 (1972).

[22] Statement of Representative Martha Griffiths, note 10, *supra*, at 268.

by the marriage penalty often find that the amounts withheld from their wages are significantly less than their actual tax liability.[23]

As this Court has already indicated in *Goldfarb* and *Jobst*, legislation which has a discriminatory impact and discriminatory origins is not immune from constitutional scrutiny simply because its discriminatory nature is not obvious on its face. This is an important issue which the Court of Claims has failed to consider and one which accordingly deserves the further attention of this Court.[24]

3. In its opinion the Court of Claims assumed that if strict equal protection scrutiny is not required in this case, an increased level of due process scrutiny is similarly inappropriate. This is apparent on the face of the court's opinion since upon disposing of the question of strict scrutiny in an equal protection context, the court thereafter confined its inquiry to determining whether or not, "the present provisions pass a minimum rationality test." (App. at 14a). The court's assumption, however, is incorrect. Although this Court has followed a rigid two-tiered test of equal protection review, it has at the same time recognized that the intensity of due process scrutiny must vary in a gradual fashion depending on the nature of the personal liberties which may be affected.[25] Thus, in

[23] P.L. 91-172, §805(h)(1), 83 Stat. 487 (amending 26 U.S.C. §3402).

[24] The Court of Claims did conclude that even if the Tax Code is founded on discriminatory stereotypes about women, such a finding would not be significant unless *all* women were burdened as a result. (App. at 10a). In this regard the Court of Claims is clearly in error. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977), and *Mathews v. Lucas*, 427 U.S. 495, 504-05 n. 11 (1976).

[25] *See, e.g.*, the explanation of the standards of due process review set forth by Justice White in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) at 548-49 (dissenting opinion).

Moore v. City of East Cleveland, 431 U.S. 494 (1977), this Court mandated that when legislation impedes " 'freedom of personal choice in matters of marriage and family life,' " the "usual . . . [due process] deference to the legislature is inappropriate." *Id.* at 499. The Court added that in such circumstances the courts, "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.*

The failure of the Court of Claims to carefully scrutinize the asserted justifications for the marriage penalty is especially significant since none of these justifications can withstand the kind of review mandated in *Moore*. In the Court of Claims view, the first justification for the marriage penalty is the fact that it makes it possible to tax single-income married couples at the same rates applicable to two-income couples (App. at 14a). This, however, is a justification of doubtful value since as the Court of Claims itself concedes, "working couples have less financial ability to pay taxes than single-income couples" (App. at 13a). Moreover, there is no evidence that the architects of the 1969 Tax Reform Act particularly desired this largely coincidental effect of the marriage penalty or placed any value upon it. Indeed, the last time Congress explicitly considered enacting a marriage penalty in order to tax all couples at the same rates, it rejected such a course of action. See Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. R. 1389 at 1412 (1975).

The Court of Claims has also asserted that the marriage penalty is necessary in order to prevent married persons from manipulating their finances for tax purposes (App. at 14a). The court, however, has not recognized that this concern can be adequately addressed by much more nar-

rowly drawn legislation. For instance, if spouses were required to aggregate only their unearned (investment) incomes for tax purposes, there would be virtually no marriage penalty for the overwhelming majority of two-income married couples, and, at the same time, there would be no realistic danger of tax evasion. As well, the court's conclusion on this point is in direct conflict with this Court's holding in *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973) at 535-36.

Finally, the Court of Claims has suggested that the marriage penalty is necessary to avoid tax inequities between residents of community property states and common law states (App at 14a). This conclusion is apparently based on the belief that if married persons could elect to be taxed as if they were single, married residents of community property states would be able to file as single persons and split their incomes for tax purposes in the same way they did prior to 1948. This is plainly erroneous since Congress clearly has the power to tax married residents of community property states on the basis of their actual earnings rather than on the basis of their constructive shares of their marital community's income. Indeed, Congress has already exercised this power. *See, e.g.,* 26 U.S.C. §§911(c)(3), 981(b), 1303(c), 1402(a)(5). Of course, a decision favorable to the plaintiffs in this case would not be applicable to *single-income* couples residing in community property states. This is because such couples suffer no financial interference with their right to marry.

4. *Hoeper v. Tax Commission of Wisconsin,* 284 U.S. 206 (1931), involved a challenge under the Fourteenth Amendment to certain provisions of a state income tax statute which were essentially identical to the legislation challenged in this case. The Court struck down the Wisconsin law because it caused married taxpayers to bear a greater tax burden than unmarried taxpayers. The Court said:

> What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes. *Id.* at 216.

Yet, despite this language the Court of Claims has concluded that *Hoeper* does not require "anything other than the statutory election to file separately," even though in most instances, "couples will feel compelled to file jointly in order to achieve a lower tax liability" (App. at 11a). The court's statement that the Federal tax scheme is saved by the "option" it gives married taxpayers to file separately at rates substantially higher than those applied on a joint return or to single persons clearly overlooks the following statement of the *Hoeper ratio decidendi:*

> It can hardly be claimed that a mere difference in social relations [marriage] so alters the taxable status of one receiving income as to justify a different measure for the tax. 284 U.S. 206 at 217.

Undeniably, this holding must be interpreted as prohibiting not only the compulsory aggregation of marital income for tax purposes, but also alternative rate schedules which demand a disproportionate tax payment solely because of an individual taxpayer's marital status.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1978

APPENDIX

APPENDIX A

In the United States Court of Claims

No. 403–77

(Decided May 17, 1978)

PAUL A. MAPES and JANE A. BRYSON v. THE UNITED STATES

Paul A. Mapes, Pro se.

Theodore D. Peyser, with whom was *Assistant Attorney General M. Carr Ferguson*, for defendant. *Donald H. Olson* and *Marc Levey*, of counsel.

Before DAVIS, NICHOLS, and KASHIWA, *Judges*.

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This tax refund suit is before the court on the parties' cross-motions for summary judgment. At issue is the constitutionality of what plaintiffs characterize the federal tax system's "marriage penalty." Under existing provisions of the Internal Revenue Code, some married couples incur substantially greater personal income tax liabilities than they would if unmarried and filing as single persons. Plaintiffs contend that this discrepancy in tax liabilities constitutes a violation of the due process notions implicit in the fifth amendment and of the equal protection standards

incorporated thereunder. We disagree and, as there are no triable issues of fact, grant defendant's motion for summary judgment.

Plaintiffs seek a refund of $1,220.10 for tax year 1976, which is the additional amount they paid to IRS as a consequence of being married and thereby precluded from filing separately under the tax schedule applicable to single taxpayers. Plaintiff Mapes' taxable income for 1976 was $16,763.20. Plaintiff Bryson's taxable income was $15,890.17. Prior to filing their claim for a refund, plaintiffs calculated that under section 1 of the Code, if unmarried in 1976, Mr. Mapes would have incurred a total tax liability of $3,701 and Ms. Bryson's total tax liability would have been $3,611. The difference, which constituted their claim for refund, between the combined tax liability if unmarried ($7,312) and that incurred because they were married ($8,532.10) is $1,220.10. Plaintiffs are to be congratulated for the able way in which they have put a serious and important issue before this court.

It should be noted at the outset that not all married couples are penalized taxwise by reason of their status. To the contrary, many, if not most, married couples achieve considerable tax savings through income-splitting on a joint return. Charts I and II at the end of this opinion are taken from plaintiffs' brief and reflect their calculation of the variable impact of the penalty or reward offered for marriage. It is when both spouses generate somewhat comparable incomes that the benefits of income-splitting cease to exist. As a general rule, two-income couples would benefit from filing separately and using the tax rates applicable to single persons. They are not, however, eligible to use these schedules, but are restricted to filing jointly under Code section 1(a) or separately under section 1(d). As plaintiffs observe, of course, the option to file under section 1(d) is of marginal value to the typical couple, even those with dual-incomes, because the total tax liability of married couples filing separately nearly always equals or exceeds the combined tax liability on a joint return.

While the Code provisions involved are loosely called a "marriage penalty," their effects are thus more complex in

reality. We expect all persons to make all important decisions in life in light of their tax effect. For the tax-minded young man or woman, with a substantial income, the Code adds to the attractiveness of a prospective spouse without taxable income, and detracts from one with it. Thus the provisions may have an income-levelling effect. But we have no data showing that as yet they operate in that manner. Love and marriage defy economic analysis. As one of Gilbert and Sullivan's heroines sang many years ago:

> True love must single-hearted be
> Chorus: Exactly so!
> From every selfish fancy, free
> Chorus: Exactly so!
> The maiden who, divinely true
> Devotes herself to loving you
> Is prompted by no selfish view
> Is prompted by no selfish view
> Chorus: Exactly so!

The humor of this was in the unattractiveness of the love object. But our Internal Revenue Code provides an opportunity to the young to demonstrate the depth of their unselfishness, however kind and beautiful the beloved may be.

Formerly society frowned upon cohabitation without marriage, assessing various punitive sanctions by law and custom against the partners themselves, and their innocent offspring. Most of these have now been eliminated in our more "enlightened" society. Cohabitation without marriage, and illegitimacy, or whatever it is now called, are said to be rapidly increasing. Certainly the tax-minded young man and woman, whose relative incomes place them in the disfavored group, will seriously consider cohabitation without marriage. Thereby they can enjoy the blessings of love while minimizing their forced contribution to the federal fisc. They can synthesize the forces of love and selfishness.

It is easier, however, to point out these effects, than it is to show how the Constitution forbids the Congress from achieving them in its revenue laws. The Supreme Court is

not easily astonished by anything it finds therein. In *Commissioner* v. *Kowalski*, 98 S.Ct. 315, 326 (1977), Justice Brennan said:

> * * * [A]rguments of equity have little force in construing the boundaries of exclusions and deductions from income many of which, to be administrable, must be arbitrary. * * *

Although their constitutional challenge primarily focuses on the section 1 rates, created by the Tax Reform Act of 1969, plaintiffs also contend that several other provisions similarly penalize working married couples. One of these provisions is section 141, which prescribes the standard deduction and low income allowances available to all taxpayers. This section is said to discriminate against married taxpayers because the maximum standard deduction available to a married couple filing a joint return is always less than twice the maximum standard deduction for single taxpayers. Another such provision is section 42, which is applicable only to tax liabilities for the years 1976 and 1977. This section allows individual taxpayers to take an annual credit against their income taxes in an amount equal to the greater of two percent of taxable income up to $9,000 or $35 multiplied by each exemption claimed by the taxpayer. Unless the taxpayer is entitled to more than five exemptions, the maximum credit available under section 42 is $180. As interpreted by the IRS, this section limits married couples to a single combined credit of $180, even if both have taxable incomes exceeding $9,000. Two individual unmarried taxpayers would each be eligible for the maximum credit of $180 if they both had incomes in excess of $9,000. Thus, plaintiffs assert that the net effect of this interpretation is discriminatorily to impose a heavier tax burden on working couples, solely because they are married. Plaintiffs have limited their challenge to current section 1 rates and to section 42. They did not take the standard deduction in 1976, and therefore do not have standing to contest the constitutionality of section 141 as applied to dual income couples.

In reviewing the evolution of the tax rates in section 1 of the Code it appears that the pendulum at different times has swung to favor both married and single taxpayers, without ever quite reaching equilibrium. In fact, the perplexities of shaping a legislative scheme which distributes the incidence of the personal income tax equitably between married and single taxpayers have confounded Congress for many years. Before 1948, income was taxed on an individual basis, without regard to marital status. The loophole inherent in this set-up was that married couples fortunate enough to reside in community property states were able to split, on a 50–50 basis, the marital community's income, thereby enjoying lower graduated tax rates and reaping considerable tax savings relative to their counterparts in noncommunity property states. Income-splitting in community property states was upheld in *Poe* v. *Seaborn*, 282 U.S. 101 (1930). The issue now before the court had its roots in the Revenue Act of 1948, which sought to neutralize the effect of income-splitting in community property states vis-a-vis other married couples, and to equalize geographically taxes paid by couples. The Act amended the Code to allow all married couples to file joint returns, treating the couples as if they consisted of two single individuals each of whom had one-half the couple's combined income. The net result was that married couples paid a tax equal to twice what a single taxpayer would pay on one-half of their total income.

One of the consequences of the 1948 amendment was that single taxpayers paid substantially higher taxes than did married couples with the same income. Under the prior rates a single person's tax could be as much as 40.9 percent higher than the tax paid by couples filing a joint return on the same amount of taxable income. *See* S. REP. No. 552, 91st Cong., 2d Sess. 260 (1969), *reprinted in Internal Revenue Acts: Text and Legislative History* 1966–1970, 1639, 1909. Convinced that this disparity in tax burden was excessive, Congress enacted a new single person rate schedule designed to provide a tax liability for single persons ranging from 17 to 20 percent above that of married couples with taxable incomes between $14,000 and

$100,000. *See id.* At the same time Congress repealed the previous arrangement wherein couples had the option of filing jointly or of choosing the schedule applicable to single taxpayers. The 1969 Act substituted four schedules: sections 1(a), applicable to married individuals filing joint returns; 1(b), applicable to heads of households; 1(c), applicable to unmarried individuals; and 1(d), applicable to married individuals not filing joint returns. The rates in section 1(d) are considerably higher than those in subsection (c). Apparently Congress precluded use of the lower rates for single individuals in order to discourage married taxpayers from rearranging their finances and shifting income so as to avoid or lower their tax liabilities. *See Staff of the Joint Committee on Internal Revenue Taxation*, General Explanation of the Tax Reform Act of 1969 at 223 (1970).

Although the Tax Reform Act succeeded in removing the disparity in tax burden between married and unmarried individuals, it also created the marriage penalty, by preventing married couples from taking advantage of the lower combined rates applicable to unmarried taxpayers. While this creates some inequalities, perhaps, for two-income couples, we are persuaded that overall the legislation is constitutionally acceptable. In reaching this conclusion, we have determined that the challenged sections meet the rational basis test of *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) for purposes of equal protection analysis, and bear the required reasonable relation to a constitutionally objective under the due process clause of the fifth amendment. *See Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955). The principle of equal protection to some degree is infused into the fifth amendment concept of due process. *See Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

At this juncture we note that a suit strikingly similar to the one at bar was recently decided in the Northern District of Indiana and affirmed by the United States Circuit Court of Appeals for the Seventh Circuit, *Johnson* v. *United States*, 422 F.Supp. 958 (N.D. Ind. 1976), *aff'd sub nom. Barter* v. *United States*, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3436 (1978). This suit also was

brought by married couples seeking a refund of taxes paid over and above the amounts for which they would have been liable if allowed to file under section 1(c). The *Johnson* plaintiffs raised the full gamut of arguments available for questioning the constitutionality of the provisions: *i.e.*, due process, equal protection, and even free exercise of religious beliefs under the first amendment. The court found that the challenged rates do not offend the Constitution. We are in general agreement with the court's result and rationale, and could stop there except that the plaintiffs deserve to have their own arguments stated and discussed.

Plaintiffs first advocate that the penalty on marriage, because it burdens the fundamental right to marry, should be subjected to a strict scrutiny for purposes of equal protection and due process analysis. In making this argument, plaintiffs rely heavily on the recent Supreme Court decision in *Zablocki* v. *Redhail*, 98 S.Ct. 673 (1978). This case involved a challenge to the validity of a Wisconsin statute making court approval a prerequisite to marriage for each state resident who was under an obligation to support minor children not in his or her custody. In some instances, the statute operated to create an absolute bar to marriage, as when a resident was unable to demonstrate sufficient financial stability to satisfy the court that the minor(s) would not become a public charge. After reviewing prior cases establishing that the freedom to marry is a fundamental liberty, *see, e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 11–12 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965), the Court continued:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. *See Califano* v. *Jobst*, __U.S.__, No. 76–680, Nov. 8, 1977; n. 12 *infra*. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.
>
> [98 S.Ct. at 681.]

In note 12 the Court elaborated upon the distinctions between *Califano* v. *Jobst*, 98 S.Ct. 95 (1977) and *Zablocki* v. *Redhail*, *supra*. *Jobst* concerned a challenge to sections of the Social Security Act providing that benefits to a dependent child would terminate upon marriage to an individual not eligible for social security benefits. In upholding the termination of benefits upon marriage, the Court stated that the "general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby." 98 S.Ct. at 99.

We turn now to the question of whether strict scrutiny is the proper test for determining whether the section 1 rates or section 42 deny plaintiffs equal protection. The Supreme Court has recently reaffirmed that "equal protection analysis requires strict scrutiny only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976); *see San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973). Admittedly, the right to marry is a fundamental right. Nevertheless, we read the *Jobst* and *Zablocki* cases together to imply that the application of strict scrutiny is appropriate only where the obstacle to marriage is a direct one, *i.e.*, one that operates to preclude marriage entirely for a certain class of people, as in *Zablocki*. The effect of the rates in Code section 1 is somewhat analogous to the effect of the termination of social security benefits in *Jobst:* the elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage. More often it changes the relative attraction of different prospective spouses for the tax-minded individual wishing to marry. For many it provides an incentive to marry. The additional tax liability suffered by two-income couples who cannot avail themselves of the rates for single persons is an indirect burden on the exercise of the right to marry. It is suffered not for marrying but for marrying one in a particular income group. This does not rise to the level of an "impermissible"

interference with the enjoyment of a fundamental right. If each plaintiff allowed the other to benefit from all the income both enjoyed, as married persons historically have done, they might derive a benefit from the marital relationship, financially speaking, that justified the extra tax, even without reverting to the common law position that the husband controlled all the income of both spouses.

In addition to the fundamental interest argument, plaintiffs assert a second ground for rigorously scrutinizing the challenged provisions. They contend that because the marriage penalty has a discriminatory impact on women it is based on suspect criteria, and cannot be upheld in the absence of a showing of governmental interests. It is plaintiffs' position that the Code implicitly treats wives as secondary earners and husbands as primary earners. That is, the rates embody a belief on the part of Congress that women are not financially autonomous and that they do not contribute substantially to the support of their families. The net outcome, it is urged, is that the tax rates discriminate on the basis of sex, a result which is prohibited under the rationales of such cases as *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

We are not, however, satisfied that section 1 of the Code, which is facially gender neutral, may be struck down on this ground. The essence of the discrimination argument is that the wife's "secondary" income is taxed at higher graduated rates when that income is aggregated with the income of the husband. This is said to burden the wife's constitutional right to pursue a career, contrary to *Traux* v. *Raich*, 239 U.S. 33, 41 (1915). It seems to us that the fatal flaw in this analysis is that the Code does not label either spouse's income as primary or secondary, but simply provides for its aggregation on the joint return. It is as easy to argue that if the wife should earn a higher salary than her husband that his right to pursue an occupation is burdened by the higher marginal tax rates imposed once the income is aggregated. The Code simply does not differentiate on this basis, and its failure to do so is

likewise not per se invidious discrimination on the basis of sex.

Even assuming, *arguendo*, that the rates might reasonably be attacked as founded on discriminatory stereotypes, the joint return system does not operate to the financial detriment of all women. It is evident that many benefit by the rates created in the statute. Congress discriminates against some women in favor of others, as it does against some men in favor of others. Whenever statutes have been invalidated for invidious discrimination on the basis of sex, it has been the case that all members of the class were burdened, and not simply a portion of the class. *See Weinberger* v. *Wiesenfeld, supra; Frontiero* v. *Richardson, supra; Reed* v. *Reed*, 404 U.S. 71 (1971); *Johnson* v. *United States, supra*, 422 F.Supp. at 968–69. There is, then, no basis for us to find that the provisions in question improperly discriminate against women.

A third contention offered by plaintiffs is that the tax rates in question are invalidated by *Hoeper* v. *Tax Commission of Wisconsin*, 284 U.S. 206 (1931). *Hoeper* adjudicated the constitutionality of a Wisconsin law requiring the aggregation of the separate incomes of spouses. The combined incomes were then taxed at rates higher than would apply if the taxpayers were single and filing separately. It does not control our decision to note that dissents in that period by the Justices who dissented in that case, Holmes, Brandeis, and Stone, are usually regarded as law today. In most respects, the Wisconsin law is on all fours with the scheme adopted under the Tax Reform Act of 1969. The Court majority concluded that the Wisconsin law was arbitrary and a denial of due process under the fourteenth amendment because it measured "the tax on one person's property or income by reference to the property or income of another." 284 U.S. at 215. Plaintiffs argue that the present system, because so similar to that in *Hoeper* also deprives married couples of due process.

We find, however, that there are sufficient distinctions between the present system and that in *Hoeper* to justify upholding the current rates and filing elections. Principally, we rest on the fact that the Wisconsin law provided

no alternative to that of taxation of combined income. The federal scheme, on the other hand, offers married couples the opportunity to file separately and each be taxed individually on his or her own income. Thus, the present provision does not altogether mandate that the tax on one spouse's income be measured by reference to the earnings of the other. It does not presume as the Wisconsin law was seen to do by Mr. Justice Holmes, dissenting, that husband and wife are one, and the husband the one. Although we recognize that in most instances couples will feel compelled to file jointly, in order to achieve a lower tax liability, we do not believe that *Hoeper* requires anything other than the statutory election to file separately. It does not, as a matter of constitutional right, dictate that working married couples must also enjoy the election to be taxed under the schedules available to unmarried taxpayers. *See also Johnson* v. *United States, supra*, 422 F.Supp. at 966–68.

Eliminating, then, issues of fundamental rights and of sex, not here applicable, the standard for testing the challenged provisions is whether they are reasonable, not arbitrary, and whether they "rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). A panel of this court discusses the correct application of this standard to tax cases in *First National Bank of Oregon* v. *United States* (decided February 22, 1978, slip op.). We need not repeat what is there cited and said.

In *San Antonio School District* v. *Rodriguez, supra*, the Court eloquently discussed the difficulties of invalidating tax legislation:

> Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. * * * *No scheme of taxation*, whether the tax is imposed on property, income, or purchases of goods and services, *has yet been devised which is free of all discriminatory impact.* In such a complex arena in which no perfect

> alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all * * * fiscal schemes become subjects of criticism under the Equal Protection Clause. [Footnote omitted - Emphasis supplied] [411 U.S. at 41.]

The Court further noted that "within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." *Id.* at 42.

In this setting, we examine the respective claims of the parties about the rationality and reasonability of the present taxation schedules and elections. A major criticism plaintiffs voice is that the legislative policy of taxing all married couples equally, regardless of whether their income is derived from the efforts of one spouse or of both, conflicts with the fundamental principle of progressive taxation, that of ability to pay. It is argued accordingly that there is no rational relation to a legitimate purpose, a point amply demonstrated by the uneven impact of the marriage penalty. For example, married taxpayers with one income save as much as $1,881 a year over two single taxpayers while dual income taxpayers with the same income may pay as much as $1,264 a year more than they would if they were single. Plaintiffs contend that this situation is hardly a rational reflection of Congress' desire to tax household economies stemming from marriage. Rather, to serve due process purposes, plaintiffs would have us require that all similarly-situated married couples incur tax obligations not greater than the tax burden imposed on two single individuals with comparable incomes.

Plaintiffs offer considerable support for the argument that the marriage penalty does not reflect taxation based on ability to pay, or an allocation of tax burden designed to tax fairly the household economies achieved by marriage. They directed us to one study actually showing an inverse relationship between living expenses and the disparity between the incomes of each spouse:

> The tax provisions applying to one- and two-earner couples are identical; hence, if they have the same money income, the same number of exemptions, and the same deductions, they pay the same tax. This gives the wrong tax result, because the married couple with one spouse working has more tax-paying ability than the married couple with two spouses working. [G. Break and J. Pechman, *Federal Tax Reform, The Impossible Dream?* 34 (1975).]

Working couples have less financial ability to pay taxes than do single-income couples, principally because of the significant expenses of earning the second income, such as transportation, lunches, and clothing, which are not tax deductible. In reality, the two job couple is economically worse off. See generally Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975). The essence of plaintiffs' argument, then, is that the challenged provisions fail even the minimum scrutiny test.

Again, we cannot agree. Plaintiffs have demonstrated that the tax classifications used by Congress are imperfect and imprecise, at least to some degree. This, however, is not sufficient to justify invalidating the legislation: As the Supreme Court stated in *Dandridge* v. *Williams*, *supra*.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. * * * [397 U.S. at 485.]

Although *Dandridge* addressed state legislation, the same principles are applicable to federal statutes under constitutional attack. *E.g.*, *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).

As defendant properly asserts, there cannot be a "marriage-neutral" tax system. The policy of taxing all couples with equal incomes equally, a major factor in the 1948 income-splitting provision, is not unreasonable. Nor is it unreasonable to attempt to tax the household economies enjoyed by married people. In certain instances these assumptions fail. *See Hearings before the House Ways and Means Committee on Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working*, 92d.

Cong., 2d. Sess. 76–77 (1972). This does not invalidate the overall scheme. *See Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 25 (1916), wherein the Court noted that "it is of course superfluous to say that arguments as to the expediency of levying * * * taxes or of the economic mistake or wrong involved in their imposition are beyond judicial cognizance." Finally, we note that the legislature is entitled to make reforms on a piecemeal basis, and solve one inequity at a time, as it did in 1969, by providing relief for unmarried taxpayers. *See, e.g., Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 489.

The solution advanced by plaintiffs to provide a more equitable system of taxation is to create a third option for married couples—the ability to take advantage of section 1(c) rates. Defendant's response to this is first to note that there is some concern by Congress that this would create the temptation to shift income in various ways to avoid the higher rates. Compare H. REP. *See Staff of the Joint Committee on Internal Revenue Taxation's General Explanation, supra;* No. 1274, 80th Cong., 2d Sess, 21–22 (1948). Second, this approach would end tax equality among married couples with equal incomes. Finally, inequities would again exist among people residents of community property states and common law states.

In short, the foregoing serves to illustrate that tax disparities will exist no matter how the rates are structured. This is simply the nature of the beast. The tax law is complicated enough already without the added complexity a full solution to this problem would apparently require. We in the judiciary, are neither equipped nor inclined to second guess the legislature in its determination of appropriate tax policies. *See San Antonio School Board* v. *Rodriguez, supra.* Like the court in *Johnson,* we are satisfied that the present provisions pass a minimum rationality test, and should be upheld as constitutional.

One final point—plaintiffs have argued to us that their case is distinguishable from *Johnson* because of the existence of the oral ante-nuptial agreement entered into by them before their marriage in 1976. The terms of the agreement are that each spouse will manage his or her own

income separately, each contributing equally to the expenses of maintaining their common home. Plaintiffs argue that the existence of this arrangement provides an even better reason for finding the statute unconstitutional, at least as applied to them. The difficulty is that even if this unusual arrangement creates an additional burden for these plaintiffs, there is certainly not the massive discrimination here that is envisioned in cases such as *Reed* v. *Reed, supra,* and *Frontiero* v. *Richardson, supra.* Plaintiffs admit they cannot describe the disfavored class as those who have made agreements like theirs. In fact, the plaintiffs' extra burden appears self-inflicted.

Accordingly, we hold that the section 1 rates and section 42 are constitutional. Plaintiffs' motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted. The petition is dismissed.

CHART I

1976 MARRIAGE PENALTY BY INCOME COMBINATIONS

Husband's Adjusted Gross Income	*Wife's Adjusted Gross Income*										
	Zero	2,000	4,000	6,000	8,000	10,000	12,000	14,000	16,000	18,000	20,000
Zero	Zero	Zero	-177	-248	-319	-405	-458	-486	-625	-787	-932
2,000	Zero	54	121	91	61	- 13	- 40	-123	-190	-287	-328
4,000	-177	121	229	240	222	174	92	81	79	32	- 53
6,000	-248	91	240	263	271	168	158	212	260	213	213
8,000	-319	61	222	271	224	193	248	352	410	448	443
10,000	-405	- 13	174	168	193	227	332	446	579	622	685
12,000	-458	- 40	92	158	248	332	447	636	774	885	960
14,000	-486	-123	81	212	352	446	636	830	1,036	1,159	1,285
16,000	-625	-190	79	260	410	579	774	1,036	1,254	1,428	1,563
18,000	-787	-287	32	223	448	622	885	1,159	1,428	1,611	1,797
20,000	-932	-382	-53	213	443	685	960	1,285	1,563	1,797	1,992

All calculations assume that each taxpayer elects the standard deduction. Computations do not include the 1976 General Tax credit. A minus sign indicates a tax reduction.

CHART II

Differences Between The Tax Of A Married Couple Filing Joint Return And The Combined Tax of Two Single Persons With The Same Income Combination As The Married Couple—1976*

Joint Adjusted Gross Income	Tax Liability	*Amount of Marriage Penalty By the Ratio Of The Spouses' Separate Incomes In Dollars And As A Percent Of The Joint Tax Liability*		
		100/Zero	75/25	50/50
$ 4,000	$ 54	- 177/-327%	- 22/-40%	54/100%
$ 8,000	$ 691	- 319/- 46%	91/ 13%	229/ 33%
$12,000	$1,463	- 458/- 31%	151/ 10%	263/ 18%
$16,000	$2,244	- 625/- 27%	91/ 4%	224/ 10%
$20,000	$3,179	- 932/- 29%	184/ 5%	227/ 7%
$24,000	$4,289	-1,264/- 29%	213/ 5%	447/ 10%
$32,000	$6,992	-1,881/- 26%	429/ 6%	1,254/ 18%

* All calculations assume each taxpayer elects the standard deduction. Computations do not include the 1976 General Tax Credit. A minus sign indicates a tax reduction.

IN THE UNITED STATES COURT OF CLAIMS

No. 403-77

PAUL A. MAPES AND
JANE A. BRYSON

v.

THE UNITED STATES

Before DAVIS, *Judge,* Presiding, NICHOLS and KASHIWA, *Judges.*

ORDER

This case comes before the court on plaintiffs' suggestion and motion, filed May 30, 1978, pursuant to Rules 7(d) and 151(b), for rehearing *en banc* and rehearing, with reference to the opinion entered on May 17, 1978, dismissing the petition. Upon consideration thereof, without oral argument, by the six active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiffs' said motion for rehearing, filed May 30, 1978, be and the same is denied.

BY THE COURT
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

[JUN 23 1978]

APPENDIX B

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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26 U.S.C. §1. Tax Imposed

(a) Married individuals filing joint returns and surviving spouses.— **There is hereby imposed on the taxable income of—**

(1) every married individual (as defined in section 143) who makes a single return jointly with his spouse under section 6013, and

(2) every surviving spouse (as defined in section 2(a)),

A tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $1,000	14% of the taxable income.
Over $1,000 but not over $2,000	$140, plus 15% of excess over $1,000.
Over $2,000 but not over $3,000	$290, plus 16% of excess over $2,000.
Over $3,000 but not over $4,000	$450, plus 17% of excess over $3,000.
Over $4,000 but not over $8,000	$620, plus 19% of excess over $4,000.
Over $8,000 but not over $12,000	$1,380, plus 22% of excess over $8,000.
Over $12,000 but not over $16,000	$2,260, plus 25% of excess over $12,000.
Over $16,000 but not over $20,000	$3,260, plus 28% of excess over $16,000.
Over $20,000 but not over $24,000	$4,380, plus 32% of excess over $20,000.
Over $24,000 but not over $28,000	$5,660, plus 36% of excess over $24,000.
Over $28,000 but not over $32,000	$7,100, plus 39% of excess over $28,000.
Over $32,000 but not over $36,000	$8,660, plus 42% of excess over $32,000.
Over $36,000 but not over $40,000	$10,340, plus 45% of excess over $36,000.
Over $40,000 but not over $44,000	$12,140, plus 48% of excess over $40,000.
Over $44,000 but not over $52,000	$14,060, plus 50% of excess over $44,000.
Over $52,000 but not over $64,000	$18,060, plus 53% of excess over $52,000.
Over $64,000 but not over $76,000	$24,420, plus 55% of excess over $64,000.
Over $76,000 but not over $88,000	$31,020, plus 58% of excess over $76,000.
Over $88,000 but not over $100,000	$37,980, plus 60% of excess over $88,000.
Over $100,000 but not over $120,000	$45,180, plus 62% of excess over $100,000.
Over $120,000 but not over $140,000	$57,580, plus 64% of excess over $120,000.
Over $140,000 but not over $160,000	$70,380, plus 66% of excess over $140,000.
Over $160,000 but not over $180,000	$83,580, plus 68% of excess over $160,000.
Over $180,000 but not over $200,000	$97,180, plus 69% of excess over $180,000.
Over $200,000	$110,980, plus 70% of excess over $200,000.

* * *

(c) Unmarried individuals (other than surviving spouses and heads of households).—There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b)) who is not a married individual (as defined in section 143) a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $500	14% of the taxable income.
Over $500 but not over $1,000	$70, plus 15% of excess over $500.
Over $1,000 but not over $1,500	$145, plus 16% of excess over $1,000.
Over $1,500 but not over $2,000	$225, plus 17% of excess over $1,500.
Over $2,000 but not over $4,000	$310, plus 19% of excess over $2,000.
Over $4,000 but not over $6,000	$690, plus 21% of excess over $4,000.
Over $6,000 but not over $8,000	$1,110, plus 24% of excess over $6,000.
Over $8,000 but not over $10,000	$1,590, plus 25% of excess over $8,000.
Over $10,000 but not over $12,000	$2,090, plus 27% of excess over $10,000.
Over $12,000 but not over $14,000	$2,630, plus 29% of excess over $12,000.
Over $14,000 but not over $16,000	$3,210, plus 31% of excess over $14,000.
Over $16,000 but not over $18,000	$3,830, plus 34% of excess over $16,000.
Over $18,000 but not over $20,000	$4,510, plus 36% of excess over $18,000.
Over $20,000 but not over $22,000	$5,230, plus 38% of excess over $20,000.
Over $22,000 but not over $26,000	$5,990, plus 40% of excess over $22,000.
Over $26,000 but not over $32,000	$7,590, plus 45% of excess over $26,000.
Over $32,000 but not over $38,000	$10,290, plus 50% of excess over $32,000.
Over $38,000 but not over $44,000	$13,290, plus 55% of excess over $38,000.
Over $44,000 but not over $50,000	$16,590, plus 60% of excess over $44,000.
Over $50,000 but not over $60,000	$20,190, plus 62% of excess over $50,000.
Over $60,000 but not over $70,000	$26,390, plus 64% of excess over $60,000.
Over $70,000 but not over $80,000	$32,790, plus 66% of excess over $70,000.
Over $80,000 but not over $90,000	$39,390, plus 68% of excess over $80,000.
Over $90,000 but not over $100,000	$46,190, plus 69% of excess over $90,000.
Over $100,000	$53,090, plus 70% of excess over $100,000.

(d) Married individuals filing separate returns; estates and trusts.—There is hereby imposed on the taxable income of every married individual (as defined in section 143) who does not make a single return jointly with his spouse under section 6013, and of every estate and trust taxable under this subsection, a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $500	14% of the taxable income.
Over $500 but not over $1,000	$70 plus 15% of excess over $500.
Over $1,000 but not over $1,500	$145, plus 16% of excess over $1,000.
Over $1,500 but not over $2,000	$225, plus 17% of excess over $1,500.
Over $2,000 but not over $4,000	$310, plus 19% of excess over $2,000.
Over $4,000 but not over $6,000	$690, plus 22% of excess over $4,000.
Over $6,000 but not over $8,000	$1,130, plus 25% of excess over $6,000.
Over $8,000 but not over $10,000	$1,630, plus 28% of excess over $8,000.
Over $10,000 but not over $12,000	$2,190, plus 32% of excess over $10,000.
Over $12,000 but not over $14,000	$2,830, plus 36% of excess over $12,000.
Over $14,000 but not over $16,000	$3,550, plus 39% of excess over $14,000.
Over $16,000 but not over $18,000	$4,330, plus 42% of excess over $16,000.
Over $18,000 but not over $20,000.	$5,170 plus 45% of excess over $18,000.
Over $20,000 but not over $22,000.	$6,070, plus 48% of excess over $20,000.
Over $22,000 but not over $26,000.	$7,030, plus 50% of excess over $22,000.
Over $26,000 but not over $32,000.	$9,030, plus 53% of excess over $26,000.
Over $32,000 but not over $38,000.	$12,210, plus 55% of excess over $32,000.
Over $38,000 but not over $44,000.	$15,510 plus 58% of excess over $38,000.
Over $44,000 but not over $50,000.	$18,990, plus 60% of excess over $44,000.
Over $50,000 but not over $60,000.	$22,590, plus 62% of excess over $50,000.
Over $60,000 but not over $70,000.	$28,790, plus 64% of excess over $60,000.
Over $70,000 but not over $80,000.	$35,190, plus 66% of excess over $70,000.
Over $80,000 but not over $90,000.	$41,790, plus 68% of excess over $80,000.
Over $90,000 but not over $100,000.	$48,590, plus 69% of excess over $90,000.
Over $100,000	$55,490, plus 70% of excess over $100,000.

26 U.S.C. § 42. General tax credit

(a) **Allowance of credit.**—In the case of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the greater of—

(1) 2 percent of so much of the taxpayer's taxable income for the taxable year as does not exceed $9,000; or

(2) $35 multiplied by each exemption for which the taxpayer is entitled to a deduction for the taxable year under subsection (b) or (e) of section 151.

(b) **Application with other credits.**—The credit allowed by subsection (a) shall not exceed the amount of the tax imposed by this chapter for the taxable year. In determining the credits allowed under—

(1) section 33 (relating to foreign tax credit),

(2) section 37 (relating to credit for the elderly credit),

(3) section 38 (relating to investment in certain depreciable property),

(4) section 40 (relating to expenses of work incentive programs), and

(5) section 41 (relating to contributions to candidates for public office),

the tax imposed by this chapter shall (before any other reductions) be reduced by the credit allowed by this section.

(c) **Special rule for married individuals filing separate returns.**—

(1) **In general.**—Notwithstanding subsection (a), in the case of a married individual who files a separate

return for the taxable year, the amount of the credit allowable under subsection (a) for the taxable year shall be equal to either—

(A) the amount determined under paragraph (1) of subsection (a); or

(B) if this subparagraph applies to the individual for the taxable year, the amount determined under paragraph (2) of subsection (a).

For purposes of the preceding sentence, paragraph (1) of subsection (a) shall be applied by substituting "$4,500" for "$9,000".

(2) **Application of paragraph (1)(B).**—Subparagraph (B) of paragraph (1) shall apply to any taxpayer for any taxable year if—

(A) such taxpayer elects to have such subparagraph apply for such taxable year, and

(B) the spouse of such taxpayer elects to have such subparagraph apply for any taxable year corresponding, for purposes of section 142(a), to the taxable year of the taxpayer.

Any such election shall be made at such time, and in such manner, as the Secretary shall by regulations prescribe.

(3) **Marital status.**—For purposes of this subsection, the determination of marital status shall be made under section 143.

(d) **Certain persons not eligible.**—This section shall not apply to any estate or trust, nor shall it apply to any nonresident alien individual.

Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

No. 78-478

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL A. MAPES and JANE A. BRYSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, who are husband and wife, challenge the constitutionality of the income tax rates imposed upon married individuals on the ground that the taxes they paid as married persons filing joint returns exceeded the taxes that would have been due if they had been unmarried and filed separate returns. In this refund suit brought by petitioners in the Court of Claims, the court upheld the constitutionality of the difference in tax rates (Pet. App. 1a-23a).

1. The income tax is progressive and seeks to tax married couples with equal aggregate incomes equally. Given these two objectives, some disparities between the relative tax burdens of married persons and single persons are inevitable. In some cases, the tax will appear to penalize single persons; in other cases the tax will appear to penalize married persons. The best that can be attained is a reasonable compromise. In short, a "marriage-neutral" income tax is impossible. Bittker, *Federal*

Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1395-1396 (1975). See *Hearings on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 78-89 (1972).

The tax rates in Section 1 of the Internal Revenue Code of 1954, as amended (26 U.S.C.), are substantially the result of two major reforms that sought to minimize differences between the tax burdens borne by various groups of individuals. Prior to 1948, married couples in community property states were entitled to divide their incomes for tax purposes and thereby reduce their total tax liabilities, while couples in common law states were denied this privilege. Compare *Poe* v. *Seaborn*, 282 U.S. 101 (1930), with *Lucas* v. *Earl*, 281 U.S. 111 (1930). In order to correct the disparity of tax treatment between married couples in community property states and those in common law states, Congress in 1948 permitted income-splitting by means of the joint return. See H.R. Rep. No. 1274, 80th Cong., 2d Sess. 21-24 (1948); S. Rep. No. 1013, 80th Cong., 2d Sess. 22-25 (1948). Cf. *Fernandez* v. *Wiener*, 326 U.S. 340 (1945).

While the 1948 introduction of income-splitting benefited married persons, it was not accompanied by a reduction in the tax rates applicable to single persons. As a result, single persons thereafter paid as much as 40.9 percent more in taxes than did married couples with the same income. See S. Rep. No. 552, 91st Cong., 1st Sess. 260 (1969). Cf. *Faraco* v. *Commissioner*, 261 F. 2d 387 (4th Cir. 1958), cert. denied, 359 U.S. 925 (1959); *Kellems* v. *Commissioner*, 58 T.C. 556 (1972), aff'd per *curiam*, 474 F. 2d 1399 (2d Cir.), cert. denied, 414 U.S. 831 (1973).

In 1969, Congress sought to reduce the substantially higher tax burden on single persons.[1] It therefore amended Section 1 of the Code to provide that the taxes owing by a single person would never exceed by more than 20 percent the taxes that a married couple would pay on the same income. See S. Rep. No. 552, *supra*, at 260-262; Tax Reform Act of 1969, Section 803, 83 Stat. 678. These new rates, designed to lessen the disproportionate tax burden borne by unmarried individuals, served, in some instances, to increase the proportionate burden borne by certain married couples. Under these rates, when both husband and wife earn substantial income, their collective tax liabilities can exceed those of two unmarried individuals with equivalent incomes. This situation affects only about 20 percent of married couples. *House Hearings, supra*, at 75, 79. In general, therefore, the tax rates still favor married taxpayers.

The decision below correctly rejected petitioners' constitutional attack upon the disparity between the tax rates of married and single taxpayers. In so holding, it is in accord with a recent decision of the Seventh Circuit with respect to which the Court denied certiorari last term. See *Barter* v. *United States,* 550 F. 2d 1239, 1240 (7th Cir. 1977), cert. denied, 434 U.S. 1012 (1978). "No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." *San Antonio School District* v. *Rodriguez,* 411

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[1] In the Revenue Act of 1978 (H.R. 13511, 95th Cong., 2d Sess., Section 101 (1978)), Congress further adjusted the tax rates so as to reduce the tax burdens borne by certain married taxpayers. See generally S. Rep. No. 1263, 95th Cong., 2d Sess. 39-40 (1978).

U.S. 1, 41 (1973). Cf. *Madden* v. *Kentucky*, 309 U.S. 83 (1940); *Faraco* v. *Commissioner*, *supra*; *Kellems* v. *Commissioner*, *supra*.[2]

To be sure, the present tax system still contains some disparities. But given the inherent complexity of the problem, the taxing scheme Congress adopted in 1948 and refined in 1969, while not perfect, nevertheless satisfies the requirements of due process and equal protection. While petitioners object to the fact that, relative to single persons, married persons do not always fare as well, married persons do not have a constitutional right to most favored tax treatment. As the Seventh Circuit recently held in rejecting an identical challenge by a married taxpayer, "the inequities asserted to inhere in the 'marriage penalty,' whatever may be their persuasiveness as arguments for legislative change, do not rise to the level of constitutional violations * * *." *Barter* v. *United States*, *supra*, 550 F. 2d at 1240 (footnote omitted).[3]

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[2]The complexity of the problem here is illustrated by the solution proposed by petitioners. They urge (Pet. 17-18) that married taxpayers be taxed separately at the same rates applicable to single persons. But this approach would create as many problems as it would eliminate. For example, under the petitioners' scheme, married couples in which one spouse earned most of the income would be taxed at higher total rates than couples in which the spouses earned substantially equal amounts of income. See also *Jansen* v. *United States*, 441 F. Supp. 20 (D. Minn.), aff'd *per curiam*, 567 F. 2d 828 (8th Cir. 1977). There, the court rejected a single taxpayer's argument that the present rate schedules discriminated against single persons.

[3]Petitioners argue (Pet. 10) that their case is distinguishable from *Barter* on the ground that they entered into an antenuptial agreement in which they agreed to maintain a certain degree of financial independence from one another. But the Constitution does not bar Congress from establishing tax rates that apply to all married couples without regard to whether spouses are parties to an antenuptial agreement. As this Court noted in *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977), "[t]he broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." And, of course, a private contract cannot effectively amend an Act of Congress.

Nor does the tax law here intrude on the right of marriage or conflict with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). In *Zablocki*, the Court held that a statute which barred certain marriages could not withstand the "strict scrutiny" to which laws directly interfering with fundamental rights must by subjected. In so ruling, the Court specifically distinguished the case where the challenged statute places "no direct legal obstacle in the path of persons desiring to get married * * *" (*id.* at 387 n.12). Such laws are not subject to strict scrutiny but to normal standards of review even though they may "deter" or "burden" certain marriages. See *Califano* v. *Jobst*, *supra*, 434 U.S. at 54.

Contrary to petitioners' final argument (Pet. 18-19), the decision below does not conflict with *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931). In *Hoeper*, the Court held unconstitutional a Wisconsin law requiring a husband to report as his own the income of his wife over which he had no title or control. Here, however, the Section 1 tax rates that petitioners challenge do not require the attribution of income from one spouse to the other. The joint return for married persons is elective, not required (see Section 6013), and married persons are free to file separately.

While married persons filing separate returns will ordinarily pay more tax, in the aggregate, than if they filed jointly (see and compare Section 1(a) and (d) of the Code), each spouse still would be paying tax only on his or her separate income. Furthermore, if married persons filing separately could use the tax rates for single persons, or under any conceivable schedule pay less tax than if they filed jointly, then the tax liability of married couples would once again depend, as it did before 1948, on the amount of income attributable to each spouse. In that event, the 1948 principle of imposing the same tax on all equal-income married couples would be abandoned.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

DOJ-1978-11